BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MORGAN RUSSELL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,058,328
PRODUCERS COOPERATIVE ASSOCIATION	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the August 1, 2012, Order Denying Compensation entered by Administrative Law Judge Brad E. Avery.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Christopher J. Shepard, of Great Bend, Kansas, appeared for respondent and its insurance carrier.

RECORD

The Board has considered the same record as the ALJ consisting of the transcripts of the following depositions taken on January 10, 2012: Claimant's deposition; the deposition of Rick Weimer; the deposition of Jess Clugston, with exhibits; the deposition of Bryan Whelan; the deposition of Danny Owen, with exhibits; the deposition of Teresa Smith, with exhibits; the deposition of Greg Redmond, with exhibits; the transcript of preliminary hearing taken on January 27, 2012, with exhibits; and the transcript of the deposition of Clarence Dale Russell, taken on May 2, 2012.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to prove he suffered personal injury by accident on September 30, 2011 and denied the request for medical treatment and temporary total disability compensation.

Claimant requests review of whether the ALJ erred in finding the claimant did not meet with personal injury by accident on September 20, 2011. Claimant argues that the ALJ erred in not considering uncontroverted evidence when looking at the record as a whole, therefore, the Board should reverse the ALJ's Order and find that claimant did meet with personal injury by accident on September 30, 2011.

Respondent argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant testified that he has worked for respondent for four years as a feed mill worker. Claimant is alleging injury to his neck, left shoulder, clavicle and upper and lower back. He testified that on September 30, 2011, he experienced a rip and a pop, followed by sharp pain and burning in his left shoulder and neck after he had picked up a bag of feed off a conveyor belt and placed it onto a pallet.[1] When claimant first noticed symptoms on September 30, 2011, he felt constant pain which he described as an 8 on a scale of 1 to 10, with numbness, tingling and a burning sensation.[2] He also had complaints of tingling, numbness and burning in his hands and feet. Claimant denies any prior problems in those body parts.

Before going to work for respondent, claimant worked for Coomes Construction in Pittsburg, Kansas for two years. Before that claimant worked for G & W Grocery Store in the meat department. Claimant has a history of seizures and last saw Dr. Seglie for those seizures six or seven years ago.[3]

Claimant reported the September 30, 2011, incident to the foreman, Bucky Weimer, after the lunch break. Claimant testified that when he reported the incident, Mr. Weimer didn't say anything. He just shrugged his shoulders and walked off. Claimant also reported his accident to the other foreman Bryan Whelan and two co-workers, Jess

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[1] Claimant's Depo. (Jan. 10, 2012) at 36.

[2] Claimant's Depo. (Jan. 10, 2012) at 11-12.

[3] Claimant's Depo. (Jan. 10, 2012) at 9.

Clugston and Danny Owen. Claimant testified that Bryan Whelan told him to just deal with it. After the injury, claimant was having trouble performing his regular work duties and testified that Bryan Whelan, Danny Owen, and Bucky Weimer all complained about how slow he was working.

Claimant previously filed two accident reports while working for respondent. The first one, on November 28, 2007, for his right hand after a salt block fell on it and the other on August 21, 2008, after he slipped while pushing a dolly full of feed around a ramp and bruised his right hip.[4] Claimant reported those injuries to his foremen at the time and was given accident forms to fill out. Claimant's foreman was not around for his most recent incident and so he did not fill out an accident report.[5] Claimant testified that, prior to working for respondent, he has never been hurt on the job.

Claimant contacted his personal physician Dr. Adam Paoni about medical treatment, and an appointment was made for October 4, 2011. Claimant continued to work and discussed the incident with Jess Clugston, a co-worker. Mr. Weimer confirmed that claimant had a doctor's appointment on October 4, 2011.

Claimant testified that when he made his doctor's appointment he told the receptionist that he hurt his left shoulder and neck at work. When he arrived at his appointment on October 4, 2011, he informed Dr. Paoni that he hurt his neck and left shoulder at work and that he felt a pop and a rip like feeling followed by extreme heat and a stabbing feeling.[6] When claimant met with Dr. Paoni, x-rays and an MRI[7] were ordered and he was restricted from lifting over 25 pounds. Claimant submitted this restriction to Teresa Smith in HR and was not allowed to return to work. Claimant has not worked anywhere since October 4, 2011.

Claimant continued to work after the September 30th accident, despite the pain. Respondent alleges claimant spent part of the weekend between September 30 and October 3, 2011, lifting hay bales. Claimant admits to lifting hay bales, but denies injuring himself while lifting hay bales on October 1, 2011. The hay was received as payment for a calf he sold to Danny Owen. Claimant got 59 small bales of hay weighing 20 -25 pounds. He testified that he had to drag the bales to his truck and trailer using his right arm and Jess Clugtson picked them up and stacked them.

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[4] Claimant's Depo. (Jan. 10, 2012) at 20.

[5] Claimant's Depo. (Jan. 10, 2012) at 23.

[6] Claimant's Depo. (Jan. 10, 2012) at 46.

[7] Showed a broad-based posterior disc problem and a left pericentral disc protrusion at C6-C7.

Claimant was contacted by an insurance adjuster on October 23, 2011, and received a letter on October 24, 2011, informing him that his claim was being denied. Nowhere in the letter did it state that his claim was being denied because they didn't believe that he did not meet with personal injury by accident arising out of and in the course of his employment.[8] It does mention claimant's need for medical care due to other substantial factors.

Claimant testified that the physical problems he relates to the work injury are constant neck and back pain, numbness and tingling in his hands and feet and parts of his arms and legs and headaches followed by nausea. Claimant denies any prior neck pain. He also denies any prior low back pain. Claimant alleges that his identity was stolen so the medical records showing prior care for his neck, back and other body parts are not his. He also admits that because of his pre-existing seizure condition it is possible the records could be his and he just can't remember.

Claimant met with Dr. Edward Prostic for evaluation, on November 11, 2011. Claimant complained of pain in his neck and both shoulders, with radiculopathy to the left elbow and with numbness and tingling to all fingers of the left hand and radial side of the right hand. Claimant had limited range of motion in his neck and difficulty holding his head in position for long periods of time. His symptoms were worse with pushing, pulling, reaching, lifting, coughing, sneezing and inclement weather.

Dr. Prostic opined that claimant has bilateral carpal tunnel syndrome but no obvious cervical radiculopathy. He felt claimant should have an EMG and, depending on the results, should be offered physical therapy for his cervical spine. He also recommended carpal tunnel decompression to the wrists and epidural steroid injections if cervical radiculopathy is found.

Dr. Prostic felt claimant could return to work on light duty as long as he avoided the use of his head away from the neutral position. He opined that the September 30, 2011, accident is the prevailing factor in claimant's injury and need for treatment.[9]

Clarence Russell, claimant's father, testified that claimant was in a coma in 1989 after an automobile accident, that split his skull in three places. Mr. Russell testified that claimant suffered long-term memory loss as a result of the accident. Claimant doesn't remember any of the follow-up treatment he had after the accident, which included treatment to the neck and head.[10] Claimant's short-term memory is intact.

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[8] P.H. Trans. (Jan. 27, 2012) at 15.

[9] P.H. Trans. (Jan. 27, 2012), Cl. Ex. 2 at 3 (Prostic's Nov. 11, 2011 report).

[10] Clarence Russell Depo. at 6.

Mr. Russell testified that since the accident, he follows claimant's physical condition and for three years before claimant went to work for respondent, claimant was pain free in his neck. Mr. Russell testified that his son has not been the same intellectually since the auto accident in 1989. Mr. Russell testified that from time to time claimant would do work on the family farm building fences, performing maintenance on sheds and other odd jobs.

Rick (Bucky) Wiemer began working for respondent on February 26, 1980, and has been feed and seed and grain operations manager for respondent since March 29, 2010. Mr. Weimer testified that on September 30, 2011, he was working late because he had left earlier for a physical therapy appointment and came back. He testified he doesn't recall claimant alleging he was injured on that day. He also doesn't recall seeing claimant holding his shoulder in pain.[11] Mr. Weimer first became aware that claimant was alleging an injury when Teresa from HR told him in late October 2011 after claimant had been to the doctor and had an MRI. Mr. Weimer was never informed directly by claimant of any accident or injury.[12] He did state that claimant told him, on October 3, 2011, that he had a doctor's appointment on the 4th, and that he was going to be out for a while. Claimant said he would finish his work when he returned on the next day. Claimant did not say why he was going to the doctor and Mr. Weimer didn't ask claimant any questions as he felt that was claimant's personal business.

Mr. Weimer testified that claimant has had workers compensation issues in the past and knows the protocol for handling claims. On September 30, 2011, claimant's supervisor was Bryan Whelan and claimant was working alongside Jess Clugston. Neither Mr. Whelan or Mr. Clugston reported that claimant had a work injury.

Jess Clugston, a laborer for respondent, has worked for respondent for 5 years. On September 30, 2011, he was working in the same area as claimant. Mr. Clugston testified that most of the time he and claimant worked together bagging, but if it was a slow day then they would be separated and sent to do different jobs. He was aware that claimant had filed a workers compensation claim and that claimant had sought medical treatment.

Mr. Clugston testified that he sometimes helped out on claimant's family farm hauling hay. He specifically recalls he and Danny Owen helping to haul hay on October 1, 2011, but doesn't recall claimant complaining of any pain. The three of them hauled 30 hay bales weighing 20-25 pounds each.

Mr. Clugston testified that on September 30, 2011, he was working a couple of feet from the claimant putting feed bags on a pallet and does not remember claimant

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[11] Weimer Depo. at 9.

[12] Weimer Depo. at 10.

complaining of an injury and did not see any out of the ordinary decrease in claimant's productivity that afternoon.[13]

Bryan Whelan, a feed mill mixer for respondent, testified that he worked with the claimant once in a while during his employment with respondent. Mr. Whelan remembers working with claimant on October 4, 2011, and claimant leaving midday for a doctor's appointment. Claimant mentioned that his shoulder was hurting, but he never explained how he hurt it. Claimant was performing his work the same as he always had.[14] A week later, Mr. Whelan was told that claimant was claiming a work-related injury. There was never a discussion between he and claimant about how the accident occurred. He pretty much stayed out of the situation. Mr. Whelan testified that if someone is injured on the job they are to immediately report it to their supervisor.

Danny Owen, a mixer for respondent, has worked for respondent for 33 years. Mr. Owen testified that on October 1, 2011, claimant and Jess Clugston came out to his farm to pick up 40 bales of hay he owed to the claimant. Claimant hauled about half of the bales, putting them onto the pickup tailgate. It took a couple of hours and two trips to transport the 50 to 55 pound bales. Mr. Owen did not notice or recall claimant complaining of being in pain while transporting the hay.

Mr. Owen also knew claimant had a doctor's appointment, but didn't know for what. Later in the week, after the appointment, he found out claimant was claiming something was wrong with his arm.

Teresa Smith, HR Safety Director for respondent, found out about claimant's alleged work injury on October 11, 2011, after receiving a call from Greg Redmond. She received an official written notice on November 1, 2011. Ms. Smith testified that claimant had been injured on the job two times before and, both times, had followed the proper procedure for reporting the incidents. However, on this occasion it would seem claimant failed to follow procedure.

Ms. Smith testified that when claimant asked for time off on October 4, 2011, he told her it was because he just woke up one day and his arm was hurting and he didn't know why. Claimant was not able to return to work after his doctor's appointment because there was no light duty available within his restrictions. When claimant's restrictions are lifted he will be able to return to work. Respondent's Exhibit 1 to Ms. Smith's deposition is an Accident Reporting Standard form, dated October 10, 2009, with claimant's signature. The form discusses the worker's responsibility to immediately report any accident or incident causing an injury, to the workers supervisor.

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[13] Clugston Depo. at 20.

[14] Whelan Depo. at 10.

Greg Redmond, respondent's controller (accountant), testified that he was aware claimant was claiming a work injury on September 30, 2011, and he filled out the claim for claimant. Mr. Redmond believes claimant came to him on October 11, 2011, to file the claim, alleging shoulder and neck pain from lifting 50 pound bags. He completed the paperwork for claimant because Ms. Smith was not at work on that date, due to a family illness. Mr. Redmond testified that before September 30, 2011, he saw claimant maybe once or twice a week. He did not see claimant on September 30th, October 3rd or October 4th. He acknowledged that claimant had filed for unemployment and for disability through respondent. Mr. Redmond didn't sign off on claimant's unemployment paperwork or his disability paperwork because he was not comfortable doing so without consulting an attorney.

Claimant was treated at the Girard Medical Center Health Clinic on October 4, 2011. The intake form created on that date states "no known injury . . . worse since thurs. noc."[15] Additionally, Dr. Paoni provided a report on October 24, 2011, stating that claimant called his office on Monday, October 3rd to schedule the October 4th appointment.[16]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

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[15] P.H. Trans. (Jan. 27, 2012), Resp. Ex. B at 1.

[16] P.H. Trans. (Jan. 27, 2012), Resp. Ex. A.

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> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Claimant describes a specific traumatic incident on September 30, 3011, while handling a 50 pound bag of feed. He testified to discussing the accident and his need for medical treatment with his supervisors and co-workers. However, no employee of respondent supports claimant's testimony. None of respondent's employees working with claimant on that date were aware that claimant had alleged an injury while working.

Additionally, the medical documents created contemporaneous with the alleged accident fail to indicate a work-related connection to claimant's injuries and complaints. Plus, Dr. Paoni stated that claimant did not even contact his office to schedule the appointment until Monday, October 3rd. This was after claimant helped haul 40 bales of hay over the weekend. Neither of the people working with claimant hauling the hay noticed anything out of the ordinary. Claimant testified he was only able to use one arm while working with the hay bales. If true, this should have been very obvious to the other workers when claimant was attempting to lift the bales onto the tailgate of a pickup. But they noticed nothing unusual.

It is true claimant suffers from physical and mental maladies associated with what must have been a horrible car accident when he was in high school. However, if claimant's version of this work-related accident is to be believed, there should be some evidence supporting his description of the accident and his reported conversations with his supervisors and co-workers. There is no supporting evidence in this record. Instead, the witnesses all dispute any such injury, claimant's actions over the weekend contradict his

allegations of injury, and the contemporaneous medical records fail to identify a work related connection to his complaints.

This Board Member finds claimant has failed to prove that he suffered personal injury by accident while working for respondent on September 30, 3011. The Order of the ALJ denying claimant benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant failed to prove that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated August 1, 2012 is affirmed.

[17] K.S.A. 2011 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge